Supreme Court, U.S.
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No. 09-411

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

Eric K. Shinseki,
Secretary, United States Department of Veterans Affairs, et al

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Oscar L. Thomas, ("Thomas") is an U.S. Army Retired Senior Non-Commissioned Officer with 25 years of honorable military service, to include wartime service. Upon retirement from military service on July 31, 1989, Thomas, because of his service and the unseen wounds and scars of military service, filed claims for service-connected disability benefits with the Department of Veterans Affairs (VA).

In the processing and adjudication of his claims for those benefits, Thomas claimed that VA employees committed tortuous acts and omissions that caused him serious injury. When the VA failed or refused to properly re-adjudicate his veteran's benefit claims disputes, Thomas appeal his veteran's benefit claims disputes to the Board of Veterans Appeals (BVA) and the Veterans Court through the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a), and for his alleged common law tort claims based on acts and omissions of medical malpractice and other torts, filed civil suit in the United District Court for the District of Columbia. As explained in the Petition, these claims are now inextricably intertwined constituting a jurisdictional conflict that this Court is being asked to resolve.

1. Whether a District Court may exercise subject-matter jurisdiction over a case under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), and its framework, §§ 2671-2680, when the U.S. Attorney General or his designee fails or refuses to issue "scope of employment certifications", required by 28 U.S.C. § 2679(d)(1), certifying that each employee named in a civil suit was acting within the scope of his/her office or employment, and where the United States was never substituted as a party defendant, depriving the district court of federal statutory subject-matter jurisdiction, "all jurisdiction"?

2. In the alternative, if the district court did exercise subject-matter jurisdiction:

(a) Whether the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run and had expired under District of Columbia Law for a tort claim that accrues *only* "when a prospective plaintiff discovers both his injury and its cause", citing *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), or when "a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it", citing *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007), "when in both instances, the plaintiff was totally unaware of its "cause".

(b) Whether the filing of an amended complaint retroactively provides a district court with subject-matter jurisdiction in a FTCA case where it lacked all such jurisdiction in the first instance and where, in spite of the absence of such subject-matter jurisdiction, the D.C. Circuit Court of Appeals had nonetheless, finally decided the case, but subsequently decided and ordered that an amended complaint could be filed, allegedly bring both the original and wholly new claims, "***did not***" sue any federal employees in their individual capacity" when it had attempted to do so; and because, "the amended complaint's reference to "et al.", was "not sufficient to name ["***all***"] of the other defendants from appellant's original complaint", pursuant to Federal Rules of Civil Procedure (Fed.R.Civ.P) Rule 10(a); and, (If the amended complaint was not sufficient to ["name "***all***" of the defendants from the original complaint"], how was it sufficient to name "***any***" of the defendants?); when there was already a lack of subject-matter jurisdiction ["all jurisdiction"] under the FTCA in the first instance?

3. Did the district court act improperly and without subject-matter jurisdiction, commit plain error of law and abused its discretion by allowing the United States, (who was never a proper party defendant in this case), on behalf the Secretary, VA, and after nearly 6 years of litigation of this case on the jurisdictional issue, to raise and insert a new defense to Petitioner's Original and First Amended Complaint, e.g., the defense (that Petitioner had failed to exhaust his administrative remedies within the 2-year Statute of Limitation (SOL) required under the FTCA framework provisions, 28 U.S.C. § 2401(b), (which for the reasons already stated above, did not and does not apply), and specifically, where the defense necessarily improperly and prejudicially injected into this "case in controversy" and "dispute", the question and issue as to whether the [D]efendant/[R]espondent, [Secretary, VA], by raising that new defense, also raised and injected into the case a ("questions of law [or] fact necessary to a decision by the Defendant-Secretary under a law that affects the provision of benefits to veterans, (here, veteran's benefits to Petitioner), which here, is his raising his own questions of law [or] fact necessary to his own decision, and his decision alone to make on all questions of law [or] fact necessary to a decision (his own decisions) that (may not be reviewed by any court of tribunal), all of which by their nature and context, also became inextricably intertwined with his own benefit decisions and the courts' decisions on [his raised question of law and fact], which specifically, is ("whether Petitioner did or did not exhaust his administrative remedies within two years, e.g., (on or by a certain date after "learning of the VA examiner's diagnosis of March 5, 1991 involving a veteran's - (the Petitioner's) - benefit claims"), constituting an unauthorized review of the Secretary's decisions involving Petitioner's "veteran's benefit claims, i.e., the answer and resolution of the newly raised question or questions of law or fact?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Oscar L. Thomas, Pro Se.

The Respondents here and in the United States Court of Appeals for the District of Columbia are:

1) Eric K. Shinseki, Secretary, Department of Veterans Affairs, Agency, Defendant/Respondent
2) G. J. White, Defendant/Respondent
3) M. Corbin, Defendant/Respondent
4) Douglas A. Wallin, Defendant/Respondent
5) A. Butler, J. Jensen, Defendant/Respondent
6) C. Faye Norred, Defendant/Respondent
7) Sandra Mize, Defendant/Respondent
8) Dr. G. Thomas Yungman, Defendant/Respondent
9) Lona (Shannon) Shipley, Defendant/Respondent
10) Lucille Dunlap, Defendant/Respondent
11) A. Vangordon, Defendant/Respondent
12) Thomas Wayburn, Defendant/Respondent
13) V. L. Knott, Defendant/Respondent
14) L. Harvey, Iris Hirst, Defendant/Respondent
15) John Doe I, II, and III, Defendant/Respondent; and
16) United States of America, Defendant.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

* At some point in the litigation, Eric Ken Shinseki was substituted for his predecessor, Erick K. Peake, as Secretary, Department of Veterans Affairs, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA and its framework;

and because all of the district court's rulings, decisions and opinions grant dismissal and summary judgement to the Defendants/Respondents were improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are null and void. For this single and very important reason alone, the petition or writ of certiorari should be granted.....24

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).....25

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.....25

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to

veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....25

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....26

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The Summary Affirmance Order of the Appellate Court affirming the opinion of the district court whose review is sought is reproduced in the Appendix at A-1 - A-3 and unreported.

The Appellate Court's Order denying Request for Rehearing and Rehearing En Banc is reproduced in the Appendix at A-4, and is unreported.

The District Court's Memorandum Opinion of March 20, 2008, dismissing and granting summary judgment to Defendants/Respondents is reproduced at A-5 – A-29 and is unreported.

The Appellate Court's (initial) Memorandum Opinion, (Civil Action # 5182) in Petitioner's Initial Appeal of (Civil Action 02cv1743), reported as *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005 and reproduced in the Appendix at A-30 - A-40.

The District Court Initial Amended Memorandum Opinion of Dismissal date May 28, 2003, reported at 265 F. Supp. 2d at 41, and reproduced in the Appendix at A-51- A-67.

Department of Veterans Affairs, Regional Office, Washington, DC, Statement of the Case ("SOC"), Page 13 and date 09/29/99 is reproduced in the Appendix at A-67.1.

The District Court opinions are reproduced in the Appendix at A-16 and A-17, respectively.

JURISDICTION

Jurisdiction is proper in this Court. The judgment sought to be reviewed was entered by the U.S. District Court for the District of Columbia on March 20, 2008. Subsequently, on May 31, 2008, the trial judge denied a Motion for Reconsideration on June 17, 2008.

Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has decided an important question of federal law which has not been, but should be settled by this Court..." Supreme Court Rule 10(c).

The District of Columbia Court of Appeals for the District of Columbia Circuit affirmed the district court judgment by Summary Affirmance Order entered on May 7, 2009. Petitioner Thomas timely filed a Petition for Rehearing and Rehearing En Banc, which was denied on July 16, 2009.

The present Petition for Writ of Certiorari is filed within 90 days of the denial of Petition for Panel Rehearing by the District of Columbia Circuit and is timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

The jurisdiction of this Court to review the Judgment of the DC Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

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STATEMENT OF THE CASE

Pro Se Petitioner, Oscar L. Thomas ("Thomas" or Petitioner), a United States Army Honorably Retired and Disabled Veteran, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States (U.S.) District Court for the District of Columbia (DC District Court) granting Motion to Dismiss and for Summary Judgment of Petitioner's Complaint in favor of the Respondents under the FTCA and the affirmation of same by the United States Court of Appeals for the District of Columbia Circuit (DC Circuit).

A. Facts Giving Rise To This Case

This Petition arises from alleged claims of wrongful or negligence acts or omissions by the Secretary, Department of Veterans Affair and 15 other federal employees filed in a district court complaint under the Federal Tort Claims Act, 28 U.S.C.§§ 1346(b), dated August 30, 2002.

It presents a very unique set of unlikely and unusual legal imparities, facts, circumstances, and important questions of law, including veterans law questions warranting grant of Writ of Certiorari.[1]

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[1] This case involves the Secretary, VA who is the chief decider and final arbiter on all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors; who is also a defendant in a civil lawsuit involving claims, allegations and questions against him and his agency employees and a single veteran involving inextricably intertwined veteran's benefit claims and non-benefit tort claims, where he has to consider and decide a benefit decision claim and questions as to when the veteran first received his prior "Statement of the Case Decision" that will ultimately determine his decision as to if and when the veteran will receive certain veterans benefits; while at the same time, as to these questions, he has/is obartrarily and in his own self-

The fulcrum of this controversy is that it involves Article III of the U.S. Constitution and the intersection of at least three federal statutes:

1. The Federal Tort Claims Act (FTCA), 28 U.S.C.§§ 1346(b), 1402(b), 2401(b), 2671-2680, which allows the United States to be sued for certain torts committed by its employees. See id. § 1346(b)(1).

2. The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, which amended the FTCA, immunizes federal employees who are sued for actions "within the scope of [their] office or employment" and substitutes the United States in their place. Id.§ 2679(d)(1). However, in order for substitution to occur, certain procedures must be followed, i.e.:

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interest, prejudicial, unfairly and without affording the veteran his statutory due process in accordance with the Veterans Judicial Review Act (VJRA) and the Veterans Claims Assistance Act (VCAA), advocating, urging and arguing before the lower courts and now this Honorably United States Supreme Court that [it] should, in essence, answer this/these question(s) and render the decision for him and to him that he himself has yet to answer or make, but for which he alone must answer and make while affording the veteran his due process rights as mandated by the VJRA and VCAA. 38 U.S.C. § 511(a) and the Veteran Claims Assistance Act (VCAA). Questions on decisions that he has yet to answer/make, but which already decided by these court decisions, whe he is now relying on and will continue to rely on to denying the veteran claims for veteran's benefits. Also, in this regard, there is also a conflict of interest and the Secretary owes the veteran a duty to have rendered his own independent decisions based on VA Rules, Regulations and Laws. Specifically, 38 U.S.C. § 511(a).

- The defendant must notify the Attorney General of the suit, have the Attorney General certify his actions as "within the scope of employment," and petition the court for such certification if the Attorney General refuses to do so. See id. §§ 2679(c),(d). Once the United States is substituted as the defendant, the suit only can proceed under the FTCA. See id. § 2679(b)(1).

3. The Veterans' Judicial Review Act (VJRA) of 1988, 38 U.S.C, § 511(a) and (b), which states:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.
>
> (b) The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C.A. § 511(a) (1991).

(The full text of Article III and cited Federal Statutes at Pet's App. A-71 - A-102).

"When a federal employee is sued for a wrongful or negligent act (either in official or individual capacities), the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee 'was acting

within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1)). After certification, the named defendant employee is dismissed from the action and the United States is substituted as the defendant; the case is then governed by the FTCA. Id.

Upon his retirement from the Army after twenty five years of honorable service, to include wartime service, Petitioner filed claims for service connected disability benefits under the VJRA with the Department of Veterans Affairs (VA), Washington, DC Regional Office ("VARO" or "RO"), Washington, DC, for service connected physical and mental disabilities sustained while in the Active Armed Forces of the United States. In connection with the processing and adjudication of Petitioner's benefit claims the VARO ordered Petitioner to undergo a VA Compensation and Pension Examination. The examination was conducted over the period March 5 - 6, 1991 at VA Medical Center (VAMC), Washington, DC.

As part of that examination, on a specific claim for an in-service diagnosed chronic anxiety neurosis disability, Petitioner was also directed to undergo a mental status examination. Upon completion of the examination Petitioner was released.

In a VARO Notification Letter addressed to Petitioner dated August 19, 1991, the VARO notified Petitioner of its rating decision but not the decision dated August 2, 1991. The Letter indicated denial of Petitioner's claim for an in-service diagnosed chronic anxiety neurosis on the bases that (1) the last psychiatric examination in service made no diagnosis of the veterans mental status, and (2) on the "VA exam" a final diagnosis was not made. Although required by VA Regulation to have provided Petitioner copy of the August 2, 1991 rating decision, it was concealed and withheld from petitioner by a VA doctor until January 2002.

The VJRA process provides provision for appealing VA's rating decisions, however, here the diagnosis was concealed and withheld and the process was denied Petitioner for nearly 11 years. During this period the veteran pursued his benefit claims by filing, without the benefit of his VA benefit claims file records containing the concealed and material medical information. Petitioner requested re-open of his claim for anxiety neurosis that by this time would have became final.

In the process of appealing denial for increases and to re-open claim for anxiety neurosis to the Board of Veterans Appeals, Petitioner received a VARO Statement of the Case ("SOC") dated September 29, 1999 on October 27, 1999, (see App. A-67.1), which was the initial basis for filing Standard Form (SF) 95 Administrative Tort Claim under the FTCA dated October 11, 2001 and the filing of suit on August 30, 2002.

The VA SOC falsely and fraudulently informed Petitioner that a "VA exam of August 2, 1991" had diagnosed Petitioner with a "working diagnosis" of "hallucinatory schizophrenia",[2] a medical diagnosis that, (unknowing to Petitioner), had apparently been concealed and intentionally withheld from Petitioner by the VA doctor and others who's name and identities were also concealed and withheld by VA and not yet known or discovered by Petitioner until later n January 2002.

While in the VJRA process and appealing the VA decision that had wrongfully denied Petitioner's claim for anxiety neurosis, and after the VARO refused to correct its apparent error concerning Petitioner's claim for "anxiety neurosis",

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[2] The Petitioner had not applied nor made any claim for a service connected disability benefit for "Hallucinatory Schizophrenia". And, has claimed and showed that no such VA exam of Petitioner had ever taken place on August 2, 1991, that Petitioner never underwent any such examination period, and therefore, was never diagnosed of any such schizophrenia on August 2, 1991 and therefore, could not have learned of, nor been informed of any "VA exam of August 2, 1991). The information was a fraud to conceal and to deny the veteran his veteran's benefit claim.

Petitioner, on a belief and the information then provided in the VA SOC and available, on a slight suspension that Petitioner was intentionally being injured in some manner, and after nearly two year of investigation and inquiry, with no success in obtaining relevant information on Petitioner's veteran's benefit claims, and after the VARO had promised Petitioner that it would correct the claimed errors, but after a reasonable period of time and had failed to do so, filed SF 95 Administrative Claim with the VA "Agency" on October 11, 2001; in spite of the prohibitions in 38 U.S.C. § 511(a) as to what was then clearly a veteran's benefit claim confined and restricted solely to the Secretary, VA's domain.

However, on November 10, 2001, because the VARO had failed to correct the error as promised and VA correspondence and verbal communication with VA indicated that the VA was intentionally misleading Petitioner about the matter, further suspecting possible injury, Petitioner filed an Amendment to the October 11, 2001 Administrative Claim as a continuing tort violation because VA correspondence had misled Petitioner that it was correcting the alleged error but was then indicating that it would not while continuing to conceal information, document and records. Petitioner reiterates: That at this time on October 11, 2001, Petitioner was not aware that VA doctor and others were still concealing and withhold from Petitioner the doctor's March 5, 1991 "working diagnosis of Hallucinatory Schizophrenia", and material medical information documenting the medical diagnosis, which was not released by Defendants/Respondents and finally discovered. Also, discovered at that time was Dr. Kelly's and the other Defendants/Respondents many intentional and continuous "false and fraudulence" causing "reliance" and the continuous fraud of the VA doctors' and the others' concealment(s), e.g., that:

> "The Petitioner had really never applied nor made any claim for a service connected disability benefit for "Hallucinatory Schizophrenia". That the concealed

> information and evidence showed that no such VA exam of Petitioner had ever taken place on August 2, 1991, that Petitioner never underwent any such examination on August 2, 1991, that Petitioner was never diagnosed of any such diagnosis on August 2, 1991, that the information was a fraud to deny the veteran his veteran's benefit claims and therefore, could not have learned of, nor been informed of any "VA exam of August 2, 1991) by Dr. Kelly and the other named Defendants/Respondents, as claimed by the VA and the United States, who never became a party-defendant."

These are the acts and omissions alleged and claimed in Plaintiff's/Petitioner's Original and Amended SF-95 Administrative Claims, Original and Amended Complaints for which Respondents are liable to Petitioner in Petitioner civil action. When, after 18 months the VA had failed to issue or make a grant of denial of Petitioner's administrative claims. Petitioner filed suit on August 30, 2002.

B. The District Court Proceedings

In the suit, among others, Petitioner alleged claims under the Federal Tort Claims Act ('FTCA"), 28 U.S.C. § 1346(b). In addition to these FTCA claims, the forty-four-page complaint also alleged Privacy Act/Freedom of Information (FOIA) violations, constitutional violations under *Biven*, and other common state law claims by the VA and several VA employees, for defamation, fraud, loss of consortium, and estoppel. The complaint named the Secretary, VA and 15 other named VA-employee-agents as Defendants. See D.C. Circuit Opinion of January 14, 2005 at p. 4, Pet.'s App. at A-33.

Shortly after Petitioner's filing of the civil action and after some 18 months later, Petitioner received a notice of denial from the Secretary, VA, essentially denying the claims based

on the defense that after review of file and material submitted, Defendants' found "no such negligent acts of omissions, denying the allegations and in essence, specifically saying that the VA had determined that the named employee-agents did not/had not committed the alleged acts and omissions while acting within the scope of their employment. See Department of Veterans Affairs Letter dated August 26, 2002 at Pet's App. at pp. A-68 - A-70.

"When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee 'was acting within the scope of her/his office or employment at the time of the incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1)). After certification, the named defendant employee is dismissed from the action and the United States is substituted as the defendant; the case is then governed by the FTCA.

On January 27, 2003, United States Justice Department Attorney's filed an answer to the original complaint, and they either failed and/or refused to issue Westfall Act "certifications" certifying "scope of office or employment of the Secretary and the 15 employee-defendants named in the complaint, (whereas the United States Attorney General or his designee may issued such certification under the Westfall Act, 28 U.S.C. § 2679(d)(1), certifying, (in this case, that each of the named employees, as to the claims and complaint allegations alleged in the complaint against them), were acting within the scope of their office or employment).

This failure by the U.S. Attorney General or his designee was futile and means that the United States would not be and was never properly before the district court as a Defendant, and that the district courts was deprived of subject-matter jurisdiction over Petitioner's case under the Federal Tort Claims Act ("FTCA") and its framework provisions, 28 U.S.C. § 1346(b)-et seq., because the United States was never

substituted as a party-defendant in place of the named federal employee-defendants pursuant to the Westfall Act. 28 U.S.C. § 2679(d)(1). See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). In *Lamagno*, this Court said, ("we held that the Attorney General's certification is "the first, but not the final word" on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant"), 515 U. S., at 432. This clearly meant that the district court lacked FTCA subject-matter jurisdiction over the case in its entirety; that the action is not and cannot be "deemed an action against the United States . . . , and the United States "was never deem to be substituted as the party defendant" pursuant to 28 U.S.C. § 2679(d)(1) (emphasis added).

On March 28, 2003, the district court, without that subject-matter jurisdiction, without ("all jurisdiction") ("the United States was never substituted") on the argument of the improper party, erroneously pursuant Federal Rule of Civil Procedure (Fed.R.Civ.P.), Rules 12(b)(1) and (6) and clearly in violation of the Westfall Act Certification Process, federal statute, 28 U.S.C. § 2679(d)(1)[5], filed Motion to Dismiss Petitioner's original complaint, only originally raising the erroneous defense that all of Petitioner's claims were simply "veterans benefit claims" barred from review by the courts pursuant to 38 U.S.C. § 511(a), and not by any other raised affirmative defense to the complaint.[6]

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5 THE *WESTFALL* ACT CERTIFICATION PROCESS:
The *Westfall Act* authorizes the Attorney General to certify that a United States employee was acting within the scope of his employment at the time of an incident giving rise to a civil claim. *See* 28 U.S.C. § 2679(d)(1) and (2).

6 Review of a VA's determination in an individual benefit claim by a federal district court is precluded by 38 U.S.C. § 511 ("the decision of the Secretary as to any question [that affects the provision of benefits to veterans] shall be final and conclusive and may not be reviewed by any other official or by any court").

On May 1, 2003, in response to the "improper-defendant" motion to dismiss, Petitioner challenged that motion on grounds and issues, among others, that the U.S. Attorney General had failed or refused to issue "scope of employment certifications pursuant to 28 U.S.C. § 2679(d)(1), depriving the district court of Article III and 28 U.S.C. § 1331 subject-matter jurisdiction, of "all jurisdiction" under the FTCA, (because, again, the United States was never substituted as the defendant in place of the named employee-defendants, the district court's subject-matter jurisdiction was never [I]nvoked). 28 U.S.C. § 2679(d)(1). Petitioner also challenged that motion with his own opposition and cross-motion for summary judgment on that same date, and on May 2, 2003, Petitioner also filed a Motion to Amend the Complaint to add new defendants and to add other tort claims, (based on the continuing tort violation doctrine).

On May 28, 2003, the district court, finding pursuant to 38 U.S.C. § 511(a), that it "lacked subject-matter jurisdiction", but for other reasons, denied the motion to amend and dismissed all of Petitioner's claims and the entire original complaint based on its findings and determination that all of Petitioner's claims were not FTCA claims, but in fact, veteran's benefit claims, barred by § 511(a). Pet's App. at pp. A-41 - A-50.

Upon denial of a timely filed 06/02/2003 Motion for Reconsideration of that decision by the district court, Petitioner then timely filed an 07/15/2003 Notice of Appeal of the district court's decision to the United States Court of Appeals for the DC Circuit.

C. Apppellate Court Proceedings (Initial)

After a thorough brief of the raised jurisdictional issues to the Court, which did not include any defense by the Defendants/Respondents based on "expiration of the Statute of Limitation", any defense of "failure to exhaust administrative remedies", or based on any other defense that

could have been raised and adjudicated at that time, in a January 14, 2005 Memorandum Opinion, (Pet's App. at A-30 - A-40), the DC Circuit Appellate Court, seemingly not mindful of the district court's lack f subject-matter jurisdiction under the FTCA in the first instance, and that the United States had not been substituted and deprived of that jurisdiction by the United States itself, adjudicated Petitioner's appeal by affirming in part and reversing in part the decision of the district court. The Circuit Court ordered that the district court "***has jurisdiction***" to adjudicate some of Petitioner's tort claims for failure to inform, warn, treat or refer Petitioner for the diagnosis of "hallucinatory schizophrenia". The jurisdictional issue was settled. The appellate court then remanded the case with instructions to the district court to conduct further proceedings consistent with its opinion, i.e., (that the district court had subject-matter jurisdiction to adjudicate not barred by § 511(a) (emphasis added). See Pet's App. at A-40.[7]

However, because the district court, in fact, never had subject-matter jurisdiction over Petitioner's FTCA claims under the FTCA in the first instance and therefore, cannot be considered a "final Judgment" and therefore, depriving this Court of jurisdiction to adjudicative Petitioner's appeal on the merits, because the district court's initial decision and all decisions thereafter are all without any legal force or affect in

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[7] The DC Circuit Court of Appeals Opinion specifically Ordered that:

> "In light of our determination that the district court has jurisdiction over Thomas's FTCA claims, however, we will remand his request to add a claim against the VA for "failure to diagnose, inform, warn, or treat," 265 F. Supp. 2d at 40 n.5. Once Thomas amends his complaint, the district court, applying *Price* and this decision, will need to decide whether section 511 bars the additional allegation. We reverse the dismissal of counts III, V, and X, as well as the denial of Thomas's request to amend his complaint to add another tort claim, and remand for further proceedings consistent with this opinion."

law and the district court's decision is null and void - because the district court lacked Article III, 28 U.S.C § 1331 and § 2679(d)(1) statutory subject-matter jurisdiction, "all jurisdiction" over (to adjudicate) Petitioner's FTCA civil action under the FTCA framework provisions. 28 U.S.C. §§ 2671 through 2680.

This is true because it is only after the certification process has taken place, (that did not take place), that the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant." *United States v. Smith*, 499 U.S. 160, 164 n. 5 (1991) (brackets in original) (quoting 28 U.S.C. § 2679(d)(2)); *see also Haddon*, 68 F.3d at 1423; *Bancoult*, 370 F. Supp. 2d at 6.

It is only that [o]nce the United States is substituted, that the suit is to "proceed in the same manner as any action against the United States filed pursuant to section 1346(b) . . . and shall be subject to the limitations and exceptions applicable" to actions under the FTCA. 28 U.S.C. § 2679(d)(4); see also *Schneider*, 310 F. Supp. 2d at 264.

Because the *Westfall* Act provisions did not apply, the rule that the FTCA is the exclusive remedy for claims against the named federal employee-defendants for the alleged common law torts and other claims brought "for a violation of the Constitution of the United States;" or claims brought "for a violation of a statute of the United States", were, for the reasons already stated above, not subject to district court adjudication under the FTCA.

The U.S. Attorney, pursuant to the *Westfall Act*, 28 U.S.C. § 2679(d)(2) (1988) (the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, Sec. 6, 102 Stat. 4563, 4564-65 (1988)), and 28 C.F.R. Sec. 15.3 (1993), although authorized and may, never certified that the named employee-defendants had been acting within the scope of their office or employment when the incident allegedly took place. Again, see Department of Veterans Affairs Letter to Plaintiff/Petitioner at Pet's App. A-68 A-70. As a result of the

lack of his/her certifications, the United States was never substituted as party defendant and the district court lack jurisdiction.[8] *Osborn v. Haley*, 549 U.S. 225 (2007).

Therefore, all other claims alleged in the complaint against these named federal employees based upon their conduct undertaken within the scope of their office or federal employment, but which the improper-defendant government has explicitly denied, or otherwise, are *not* barred by the Act because, it simply did not and does not apply in this instance. The U.S. Attorney General simply never filed the certifications invoking the Act, indeed, he or she could not have issued any such certifications, because the agency had already stated in its, albeit late by at least 12 moths after its after-the-fact denial decision of August 26, 2002, that it had determined that none of the acts and omissions alleged in the Administrative Claim had been committed by any employee while acting within the scope of his or her employment. Thus, Petitioner's district court claims, FTCA claims or otherwise, did not fall, indeed could not have fallen within the purview of the *Westfall Act's* rule, provisions or framework and any possible absolute immunity for these federal employees - because the United States was never substituted as a party-defendant in their place and the district court's subject-matter jurisdiction was never invoked. Yet, although it lacked subject-matter jurisdiction, "all jurisdiction", in a memorandum opinion dated March 17, 2003, an opinion which is now clearly shown to have been null and void, erroneously dismissed Petitioner's district court complaint in its entirety for no other reason, other than what it found as being partially barred by the VJRA, 38 U.S.C. § 511(a).

However, Petitioner had timely and squarely raised this federal question (§ 2679(d)(2), 28 U.S.C.) issue before the district court in a response and cross-motion for partial summary judgment to the "improper

[8] Prerequisite for substitution under the *Westfall Act* is certification.

Defendants'/Respondents' motion to dismiss and for summary judgment on May 19, 3003", see Pet's App. at pp A-51-A-67, p. A-57, and has in every other pleading thereafter.

Petitioner assigns error to district court entire opinions and the DC Circuit's affirmation of those opinions. (Pet's App. at A-5–A-29 and A-41–50). The dismissals and the granting of summary judgment to the Defendants/Respondents as to all claims in Plaintiff/Petitioner's Original and Amended Complaints were clearly unlawful. The district court had improperly dismissed Petitioner's original district court and Amended complaints pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in the first instance, and in the second instance, as for having "failed to exhaust administrative remedies" - because that Act and its provisions was never invoked and 28 U.S.C. § 2679(d)(1) and (2); 28 U.S.C. § 2401(b); and 38 U.S.C. § 511(a) did apply. (For the district court to act, it [m]ust have subject-matter jurisdiction).

Acting in response to the improper dismissal, false, erroneous, null and void rulings of the district court and partial reverse and remand of those rulings, on January 5, 2006, Pro Se Plaintiff/Petitioner, because he had no other option or remedy, filed an amended complaint in the district court re-alleging all claims not affirmed as dismissed and reversed by the appellate court and bringing another FTCA claim as authorized by the appellate court's opinion, alleging new claims against all original defendants and additional new then unknown John Doe defendants.

However, because within the case the DC Circuit Appellate Court had ruled and ordered in referenced to the Original Complaint, that:

> The district court's lack of jurisdiction over petitioner's Privacy Act and *Bivens* claims, as well as its denial of his motion for leave to amend," that "These arguments required little discussion." That,

"As to Thomas's Privacy Act claims, the district court had correctly found them barred by section 511." That, "Thomas's constitutional claims for money damages against VA employees were also barred." That, "Under *Bivens*, "special factors" may counsel "hesitation in the absence of affirmative action by Congress" establishing liability for the acts of individual government employees."" See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)." "Special factors" included "an elaborate remedial system" constructed by Congress "with careful attention to conflicting policy considerations." *Bush v. Lucas*, 462 U.S. 367, 388 (1983)." That, "Here, "the administrative process created by Congress (the VJRA, 38 U.S.C. 511(a)), provides for a comprehensive review of veterans' benefits disputes." And that, "Further, Congress has explicitly precluded judicial review of veterans' benefits disputes, (see Petitioner's Argument at Footnote 1 above), which suggests that Congress' failure to create a remedy against individual VA employees was not an oversight." *Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995) (internal quotation marks omitted); accord *Sugrue v. Derwinski*, 26 F.3d 8, 12-13 (2d Cir. 1994). That, "Because we agree with the Fifth Circuit that this combination forecloses a *Bivens* action against VA employees for constitutional torts in the context of a dispute over veterans' benefits, we will affirm the district court's dismissal of these claims. And that, "Finally, reviewing for abuse of discretion, see *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam), we will also affirm the district court's denial of leave to amend the complaint to add a legal malpractice claim against Thomas's former legal representatives and another Privacy Act claim. *See* 265 F. Supp. 2d at 40 n.5. As the district court noted, Thomas "remains free to

> assert [these] claims in a new action against the appropriate defendants." *Id.* In light of our determination that [the district court ***has jurisdiction*** over Thomas's FTCA claims], however, we will remand his request to add a claim against the VA for "failure to diagnose, inform, warn, or treat," 265 F. Supp. 2d at 40 n.5. Once Thomas amends his complaint, the district court, applying *Price* and this decision, will need to decide whether section 511 bars the [a]dditional allegation."

In Section IV of the Opinion the DC Circuit Court said: We reverse the dismissal of counts III, V, and X, as well as the denial of Thomas's request to amend his complaint to add another tort claim, and remand for further proceedings consistent with this opinion. In all other respects, we affirm.

Even as a Pro Se litigant, Plaintiff/Petitioner knows and knew that the DC Circuit Court's January 14, 2005 Memorandum and Judgment, un-appealed by the Defendants/Respondents, meant that the subject-matter jurisdictional issues was settled as to Plaintiff/Petitioner's FTCA claims, (even if the lower court did in fact, have jurisdiction in the first instance) was resolved).

Because the FTCA 28 US.C. § 1346(b)(1) waives the United States sovereign immunity to be sued, the U.S. Attorney General or his/her designee never issued Westfall Act certifications certifying that each employee was acting within the scope of his or her office or employment, no named Defendant/Respondent have sought certification by the court on their own individual behalf, and named employee having even filed answer or other pleading, they are all in default and liable to Plaintiff/Petitioner on all claims and counts in the original and amend complaint.

D. District Court Proceedings on Reversal and Remand

On January 5, 2006, Plaintiff/Petitioner filed motion in the district court to filed an Amended Complaint. The district court granted the motion and the amended complaint was considered filed on March 1, 2006. In the Complaint Plaintiff/Petitioner named all of the original defendants and Respondents as ["*R. James Nicholson, et al*"] and as new defendants, ["John Does 1 - 4"].

On March 2006, Justice Department Attorney's filed answer to Plaintiff/Petitioner's amended complaint on behalf of the named defendants.

On March 1, 2006, the district court also issued order for a Proposed Scheduling Order with a Scheduling Conference scheduled for September 2006. Initial Scheduling Conference set for 5/3/2006

On September 3, 2006, Plaintiff/Petitioner moved in the district court and filed Renewed Motion for Partial Summary Judgment. The Defendants failed to response to the motion.

The Scheduling Conference was conducted on September 2006 via telephone conference hook-up with Plaintiff/Petitioner who resides in Germany.

The district Court said it would take Plaintiff/Petitioner's Renewed Motion for Partial Summary Judgment for review and consideration.

On September 27, 2006, the district court issued a scheduling order setting deadline for completion of discovery and for filing amended complaint, only by leave of the court.

On October 2006, without notice, reason or a Hearing, the Magistrate Judge struck Plaintiff/Petitioner's Renewed Motion for Partial Summary Judgment.

During discovery proceedings, a dispute arose, and without Plaintiff/Petitioner being able to conduct any effective or reasonable discovery, on motion by the defendants/ respondents, the district court granted defendants a motion for protective order, effectively foreclosing any chance for reasonable and needed discovery.

On November 2006, Plaintiff/Petitioner moved by motion to reopen and for a 60-day extension of time to conduct and

complete discovery, and for an extension of time at the end of that discovery to file motion for leave to file an amended complaint. The district court never responded to Plaintiff/Petitioner's motion requests while at the same time granting defendant/respondents motions for extensions of time (in access of 100 days) to filed out-of-time pleadings and responses to Plaintiff/Petitioner's motion requests and filings, to include responding to Plaintiff/Petitioner's Renewed and Second Renewed Motions for Partial Summary Judgment. The district court then allowed the United States, who had never became a defendant in the case, to file motions to dismiss and for summary judgment, contending that Plaintiff/Petitioner had failed to serve the John Does within the time allowed by Rule 4(m); and had failed to exhaust his administrative remedies within the 2-year statute of limitation period required under the FTCA framework provisions of 28 U.S.C. § 2401(b).

In response to the "improper United States Defendants' motions, among other assertions, Petitioner again raised the issue before the district court that the U.S. Attorney had failed or refused to issue "scope of office or employment certification for each named defendant to the complaint, that the United States was never substituted as a party defendant, that the district court lacked subject-matter Article III and statutory subject-matter jurisdiction, and that the district court had improperly adjudicated/reviewed Petitioner's case under the FTCA and review of veteran's benefit claims. The defendants,(the Secretary, VA) argued that it was not a "condition precedence" that the U.S. Attorney General was required to issued the certification(s) to invoke district court jurisdiction, and that this was only required when "a case had been filed in a state court." The district court agreed with defendants/respondents arguments. The district court explained Petitioner's claim of lack of subject-matter jurisdictional claims and allegations as ("this Court is puzzled by Mr. Thomas' argument"), and ("The Court assumes that Mr. Thomas means to argue that the Court does have

jurisdiction over his claims"). To further sustain their erroneous defense argument that "scope of office or employment certifications were not required to be issued by U.S. Attorney or his designee to invoke the district court subject-matter jurisdiction", Defendants/Respondents, relying on Rule 10(a), raised an additional new erroneous argument "that Plaintiff/Petitioner, in the filing of his first amended complaint, had "dropped" all of the originally named defendants named in the original complaint from the amended complaint", and "had not sued any of them in the amended complaint in their "individual capacities." That "Plaintiff/Petitioner's use of [et al.] was "insufficient to named all of the defendants from appellant's original complaint." However, even if the use of [et al.] was "insufficient" to name [a]ny of the defendants from the appellant's original complaint, it was sufficient to name them all, and but for a mute pleading error, even if can be considered that, it would have spelled out their names and named them all in the caption other than ("R. James Nicholson, Secretary, Department of Veterans Affairs, ["et al.]). Plaintiff/Petitioner had also requested to file a second amended complaint; whereas, Fed.R.Civ.P., Rule 15(a) commands that "motion to amend should be given freely". The district court committed error and abuse any discretion it may had, which it did not, when it did not allow a correction of the caption of the complaint in that instance. And, if it could even be considered that Plaintiff/Petitioner "had not sued "any of them in the amended complaint in their "individual capacities"", which it cannot, the *Westfall* commanded that:

> "When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the *Westfall Act*) empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the

incident out of which the claim arose.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-420 (1995) (quoting 28 U.S.C. § 2679(d)(1))."

The Defendants/Respondents named in the amended complaint were all "federal employees", to include, [R. James Nicholson, Secretary, Department of Veterans Affairs, [et al.]. 28 U.S.C. § 2679(b)(1). (for "[s]ection 2679(b)(1) applies without exception to [a]ny [mployee of the Government"). See *Sullivan v. United States*, 21 F3d 198, 201 n. 6 (7th Cir.), cert. denied, – U.S. —, 115 S.Ct. 670, 130 L.Ed.2d 604 (1994). *Sullivan*, 21 F.3d at 202. See also 28 U.S.C. Sec. 2671.

Also, here and observing the aforementioned arguments concerning lack subject-matter jurisdiction, etc., the Defendants/Respondents' were nevertheless, allowed by the district court after nearly 6 years of litigation to raise and insert the new defense that Petitioner had failed to exhaust his administrative remedies within the 2-year Statute of Limitation (SOL) required under the FTCA framework provisions, 28 U.S.C. § 2401(b), (which for the reasons already stated above, does not apply). However, the defense, necessarily injected into this "case in controversy" and "dispute" the question and issue as to whether the Defendant/Respondent, Secretary, VA, by raising what becomes "a veteran's benefit question of fact and law" and his "answer/decision to this question/issue into this case. (A raised "questions of law [or] fact necessary to a decision by the Defendant-Secretary under a law that affects the provision of benefits, (here, veterans benefit to Petitioner), which here, is his own questions of law [or] fact necessary to his own decision, and his decision alone - on questions of law [or] fact necessary to a decision and questions that (may not be reviewed by any court of tribunal) that are now inextricably intertwined with his decisions and this court's review of his decisions involving Petitioner's "veteran's benefit claims, i.e., the question of (whether Petitioner did or did not exhaust his administrative within the 2-year after

learning of "the VA examiner's diagnosis of March 5, 1991 involving a veteran's - (the Petitioner's) - benefit claims, and where, necessary to the question, Petitioner had amended and/or filed no less than three additional SF-95 Administrative Tort Claims with the Secretary Defendant/Respondent that were (based on the same "continuing tort violations, theory and conduct, based on the newly discovered facts and information that was initially and still was being fraudulent concealed by the Defendants/Respondents. Facts and information then subsequently released by the Defendants/Respondents months and years later), which was well within the limitation period that clearly establishes that the SOL could not have begun to run until January 2002, when the Petitioner first learned of his "injury" (the concealment of the March 5, 1991 diagnosis and failures to inform, warn, treat or refer for other diagnosis by VA Doctor A. R. Kelly and other before unnamed and unidentified tortferiors, and its "cause", (federal employee, Dr. A. R. Kelly's name, and his identity, and the named/identity of other federal employees, (the "personal identity" of the tortfeasors)[7]. The district court's findings that: "Thus, Mr. Thomas acknowledged receiving on October 9, 1999, the VA's SOC indicating a "working

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[7] The Defendants/Respondents contentions and the court's conclusions that Plaintiff/Petitioner first learned of his injury and its cause on October 9, 1999, was factually erroneous and legally impossible because the VA examination and diagnosis described in the "VA SOC" for which they rely on, [n]ever [t]ook [p]lace and was factually incorrect and impossible; [the examination was never conducted and never existed]. The examination and diagnosis, which a number Plaintiff/Petitioner's claims grew out of, was the occurrences of March 5, 1991, and the concealment from Petitioner of all knowledge, material medical information and medical reports of the March 5, 1991 diagnosis, and VA rating decision of August 2, 1991 (the injury), (not the defendants-alleged diagnosis of "VA Exam of August 2, 1991 stated in the "SOC""), that, even if true, provided no identity of the VA examiner, (the tortferior), Dr. A. R. Kelly and others, (its cause).

diagnosis" of schizophrenia", aside form being totally false and fraudulent, provided Plaintiff/Petitioner with absolute no knowledge, information and/or medical report of the concealment of the concealment(s) by Dr. Kelly's and others of his March 5, 1991 diagnosis; his and others concealment of his examination report/material medical information, (the injury) and his and their names and identities, (who, it turned out to be, were all VA employees), (its cause)." Here, in its analysis of the facts and evidence and application of law, the district court misapplied the controlling law precedence, that "the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run in the District of Columbia for a tort claim accrues *only* "when a prospective plaintiff discovers both his injury and its cause). *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), but erroneously when "a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it", citing *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007); or when, citing no precedence, "he had enough information from the "SOC" to have known of his alleged injury", (but not its cause), or when he "had enough information from the "SOC" to seek money damages in October 2001"..... "when the plaintiff was totally unaware of its "cause", and had no knowledge that the information in the SOC at the time of filing of the claim was completely false and fraudulent, rendering it totally and completely nonexistent, and that the correct facts, information and documents were being concealed by the Defendants/Respondents. See *Sexton v. United States*, 832 F.2d, 629, 633 (D.C. Cir. 1987), ("a plaintiff is deemed to have discovered "his injury" when he "knew or reasonably should have known of it"). *Richard v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007).

Therefore, none district court's other related findings and rulings substantiates its legal facts and conclusion of law for dismissing and granting summary judgment to the "Non-Defendant" United States. In the alternative, even if the district court had subject-matter jurisdiction, the district

court incorrectly applied the relevant claim accrual rules and standard of review to hold that petitioners' claims accrued by October 9, 1999.

E. Appellate Court Proceeding (Second Appeal)

In a two-page unpublished Summary Action Order dated May 7, 2009, (Pet's App. at A-1 - A-3), the DC Circuit Court Panel of Honorable Judges *Garland*, *Griffith*, and *Kavanaugh*, Circuit Judges, by summary affirmance, affirmed the district court's memorandum opinion of March 20, 2008 dismissing and granting summary judgment to the Defendants/Respondents as to Plaintiff/Petitioner's entire complaint in favor of the "improper defendant" the United States, who was not even and never was a proper party-defendant to the original or first amended complaint.

The DC Court of Appeals erred, (see Summary Order at Pet's App. A-1), when it summarily affirmed the district's opinion at Pet's App. at A-5 - A-29.

Because the district never had subject-matter jurisdiction in the first instance, does not have subject matter jurisdiction over complaints and questions presenting challenges to, or involves "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans, (38 U.S.C. § 511(a)), where such challenges, as here, required review of a Secretary's benefit decision in this case based on the question raised by the new Defendants/Respondents whole new defense. (The district court does not have jurisdiction over those elements of such complaints that are inextricably intertwined with the state court's decision). (Claims are inextricably intertwined if the district court must scrutinize (review) not only the challenged rule (VA Secretary decision) itself, but the state court's application of the rule). *Worldwide Church of God, 805 F.2d at 892.*

For these same reasons the DC Circuit's also lacked jurisdiction to adjudicate this case on the raised claim or defense by the Defendants/Respondents of "failure to exhaust administrative remedies" and/or "expiration of the "SOL", because the alleged and disputed accrual date of the FTCA is the same date as a claimed effective date for the grant or denial of [p]ending veteran's benefit [c]laims to be decided by the Defendant-Secretary, VA.

The record also clearly establishes that Petitioner had from the outset and throughout this litigation alleged silent and continuous fraudulent concealment on the part of Defendant/Respondents since March 5, 1991 through January 2002, clearly constituting "some extraordinary circumstances that, in the alternative, had Petitioner not timely file his claims, would have prevented Petitioner from timely doing so.

Within 45 days of the appellate court's order affirming the district court's March 20, 2008 decision, Petitioner posited a Petition for Rehearing and Rehearing En Banc with the DC Circuit Court.

On August 18, 2009, the DC Circuit denied Petition for Rehearing and Rehearing En Banc, (Pet's App. at A-4) prompting Petitioner's filing of this Petition for Writ of Certiorari.

REASONS WHY CERTIORARI SHOULD BE GRANTED

MAY IT PLEASE THE COURT:

I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA's and its framework; rendering [a]ll of the district court's rulings, decisions and opinions below improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are all null and void. For

this single and very important reason alone, the petition or writ of certiorari should be granted.

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, and improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." However, the courts have made that decision for him and this was improper.

II. Jurisdiction and Legal Standards

A. Motion to Dismiss for Lack of Jurisdiction

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."[8] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Because subject matter jurisdiction is an Article III as well as a statutory requirement, "no action of the parties can confer subject[]matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the

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[8] The District Court exercises jurisdiction under 28 U.S.C. § 1331 and under the FTCA, 1346(b), however, the District Court's order dismissing Plaintiff's/Petitioner's FTCA claims that are inextricably intertwined with veteran's benefit claims pending under 38 U.S.C. it should not be consider a final decision for purposes of 28 U.S.C. § 1291.

burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Here, the legal standard applied was simply inapplicable. First, because the U.S. Attorney General failed to issue *Certifications*, certifying "scope of office or employment" as to each employee. Second, United States was never substituted as party defendant in this case, and thus the district court subject-matter jurisdiction was never invoked (28 U.S.C. § 2679(d)(1), depriving the district court of "all federal jurisdiction" and from ever reaching the merit of the case and claims under the FTCA framework.

The district court's dismissal and summary judgment memorandum opinion, and the DC Circuit Court Summary Affirmance Action Order, affirming that opinion, both conflicts with the cited legal standard and legal authorities cited by Defendants/Respondents in Paragraph II A. *Kokkonen v. Guardian_Life. Co. of Am.*, 511 U.S. 375, 377 (1994), (Federal Courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."). *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), (Because subject-matter jurisdiction is an Article III as well as a statutory requirement, "no action

of the [p]arties can confer subject[]matter jurisdiction upon a federal court."). Here, it was only pursuant to Federal Statute 28 U.S.C. § 2679(d)(1), that the district Court's subject-matter jurisdiction [m]ay be invoked). Since it was never invoked by U.S. Attorney General's Certifications, the district court never acquired subject-matter jurisdiction.

This being the case, the district court's memorandum opinion of March 20, 2008 granting dismissal and summary judgment, and the DC Circuit's affirmance should all be considered null and void and reversed. 28 U.S.C. § 2679(d)(1). See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). (In *Lamagno*, this Court said, "we held that the Attorney General's certification is "the first, but not the final word" on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant", 515 U. S., at 432).

B. **Summary Judgment**

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Moreover, summary judgment is properly granted against a party that "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson*, 477 U.S. at 248 (1986). A "genuine issue" is one whose resolution could establish an

element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S.
at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary ijudgment. *Id.* In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

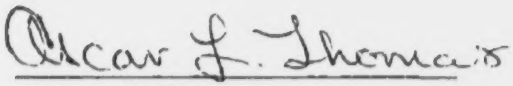
Here, as above, Plaintiff/Petitioner agrees with the stated legal standard that would normally be applied, however, for the same reasons stated above, it was simply inapplicable to this case.

Conclusion

For the cited important national interest reasons, the needs to guard and preserve of veterans' statutory rights and benefits, resolved important question of federal law, which

has not been, but should be settled by this Court the petition for writ of certiorari should be granted.

Respectfully Submitted,



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